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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD ALAN SIMPSON,

Defendant and Appellant.

B291875

(Los Angeles County
Super. Ct. No. TA127755)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed with directions.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

This is Donald Alan Simpson’s second appeal of his conviction and sentencing for felony murder in the commission of a robbery, burglary, three counts of robbery, committing a lewd act on a child, and being a felon in possession of a firearm and ammunition. In our previous opinion we affirmed the judgment of conviction but remanded for resentencing in light of multiple sentencing errors. (*People v. Simpson* (July 11, 2017, B271460) [nonpub. opn.] (*Simpson I.*)) On remand the trial court imposed a sentence on count 1 for felony murder of life without the possibility of parole. However, the court also referenced the sentence for murder (without special circumstances) as a term of “life with minimum eligibility of parole at 25 years.” The minute order from the sentencing and the abstract of judgment incorporated this language, stating the trial court imposed an additional sentence on count 1 of a life term with eligibility for parole at 25 years.

Simpson contends, the People concede, and we agree the purported sentencing of Simpson to a consecutive life sentence with a 25-year minimum parole eligibility period is an unauthorized sentence. We therefore direct the trial court to correct the July 25, 2018 minute order and the abstract of judgment by striking the reference to a life sentence with a 25-year minimum parole eligibility period, and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

Simpson also contends we should remand for resentencing in light of Senate Bill No. 1437 (2017-2018 Reg. Sess.), which became effective January 1, 2019. The bill amended Penal Code¹

¹ All further statutory references are to the Penal Code unless otherwise indicated.

sections 188 and 189 to limit who can be liable for murder under a theory of felony murder or the natural and probable consequences doctrine. We agree with the People that Simpson must first petition the trial court for relief under Senate Bill No. 1437 before raising this issue on appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The information charged Simpson with 12 counts, including murder (Pen. Code, § 187) (count 1), with the special allegation the murder was committed while Simpson was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(A)). (*Simpson I, supra*, B271460.) The information alleged Simpson personally used a firearm in connection with the murder and specified other charges (§ 12022.53, subd. (b)), and the murder and specified offenses were committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Simpson I, supra*, B271460.) The jury convicted Simpson on all counts and found each of the special allegations true. Simpson was sentenced to an aggregate state prison term of life without the possibility of parole plus 44 years four months. (*Ibid.*)

On appeal, we affirmed Simpson's convictions, but vacated the sentence and remanded for resentencing in light of multiple sentencing errors. (*Simpson I, supra*, B271460.) On remand the People and Simpson filed sentencing memoranda. At the July 25, 2018 sentencing hearing, the court heard argument of counsel, then resentenced Simpson. The court incorporated its findings as to mitigating and aggravating factors. On count 1 for murder with the special circumstance it was committed in the commission of a robbery, the trial court sentenced Simpson to life

imprisonment without the possibility of parole.² However, before imposing this sentence, the court stated, “the section 187 . . . life with minimum eligibility of parole at 25 years.” The July 25, 2018 minute order states that Simpson “is sentenced to life with eligibility of parole at 25 years.” The abstract of judgment similarly reflects the sentence on count 1 of life without the possibility of parole but also indicates, “Defendant is sentenced to Life with eligibility of parole at 25 years.”

The trial court stated it was exercising its discretion not to strike the firearm-use enhancement as to count 1, and imposed a consecutive term of 10 years under section 12022.53, subdivision (b). The court also imposed a consecutive 10-year term for the gang enhancement under section 186.22, subdivision (b)(1)(C). The court sentenced Simpson to an aggregate state prison sentence of life without the possibility of parole, plus a life sentence with a 25-year minimum parole eligibility period, plus 44 years four months.

Simpson again appealed.

DISCUSSION

A. *The July 25, 2018 Minute Order and Abstract of Judgment Must Be Corrected To Strike the Reference to a Life Term with a 25-year Minimum Parole Eligibility Period*

We do not read the trial court’s statement as to count 1 that “the section 187 . . . life with minimum eligibility of parole at 25 years” was intended to reflect the court’s imposition of an

² Because Simpson only appeals from the sentence on count 1, we do not discuss the sentencing on the remaining counts or underlying facts.

additional life sentence with a 25-year minimum parole eligibility period. The People concede that imposition of an additional life term would be erroneous, and we agree. Therefore, the July 25, 2018 minute order and the abstract of judgment must be corrected to reflect the trial court’s pronouncement of sentence by striking any reference as to count 1 of an additional life term with a 25-year minimum eligibility. (See *People v. Jones* (2012) 54 Cal.4th 1, 89 [“When an abstract of judgment does not reflect the actual sentence imposed in the trial judge’s verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties.”].)

B. *Simpson May Only Seek Relief Under Senate Bill No. 1437 by Filing a Petition in the Trial Court*

1. *Senate Bill No. 1437*

On September 30, 2018 Senate Bill No. 1437 was signed into law, effective January 1, 2019. Senate Bill No. 1437 was enacted to “amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 1; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).) “Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability.” (*Martinez*, at p. 723.)

Prior to the enactment of Senate Bill No. 1437, murder committed in the perpetration of or attempt to perpetrate

specified felonies, including robbery, was first degree murder. (Former § 189; *People v. Powell* (2018) 5 Cal.5th 921, 942 [““Under the felony-murder doctrine, when the defendant or an accomplice kills someone during the commission, or attempted commission, of an inherently dangerous felony, the defendant is liable for either first or second degree murder, depending on the felony committed.””].) Effective January 1, 2019, Senate Bill No. 1437 amended section 189 and added subdivision (e), which provides that “[a] participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”

The legislation also added section 1170.95, which provides a procedure for people convicted of murder to petition the trial court for retroactive relief if the changes in the law affect their previously sustained convictions. (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 4.) Section 1170.95, subdivision (a), provides, “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable

consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.” Section 1170.95, subdivision (b)(1), provides that the petition “shall be filed with the court that sentenced the petitioner.”

Pursuant to section 1170.95, subdivision (b)(1)(A), the petition must include a declaration by the petitioner that he or she is eligible for relief under the section. Upon receipt of the petition, the trial court must determine if the petitioner has made a prima facie showing he or she falls within the provisions of the section. (§ 1170.95, subd. (c).) If the petitioner has made such a showing, the trial court “shall issue an order to show cause.” (*Ibid.*) The trial court must hold a hearing within 60 days from issuance of the order to show cause “to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not . . . previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.” (§ 1170.95, subd. (d)(1).) If a hearing is held, “[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.” (§ 1170.95, subd. (d)(3).) “[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.” (*Ibid.*)

2. *Retroactivity of Senate Bill No. 1437*

Simpson contends the Legislature intended that Senate Bill No. 1437 apply retroactively to Simpson’s sentence, citing to the Supreme Court’s holding in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and the language in Senate Bill No. 1437 that “[t]his bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill.” (Legis. Counsel’s Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.) Summary Dig.)

In *Estrada*, the Supreme Court held that when the Legislature amends a statute to reduce the punishment for a criminal offense, the amended statute is presumed to apply to all defendants whose judgments were not yet final on the statute’s operative date, unless the Legislature clearly states to the contrary. (*Estrada, supra*, 63 Cal.2d at p. 744.) In two recent cases, however, the Supreme Court concluded as to Proposition 47 (the Safe Neighborhoods and Schools Act; § 1170.18) and Proposition 36 (the Three Strikes Reform Act of 2012; § 1170.126) the procedures under the initiatives for petitioning the trial court were the exclusive means of obtaining retroactive relief in light of the initiatives’ detailed procedures for petitioning for retroactive relief. (See *People v. DeHoyos* (2018) 4 Cal.5th 594, 603 (*DeHoyos*) [“. . . Proposition 47 is an ameliorative criminal law

measure that is ‘not silent on the question of retroactivity,’ but instead contains a detailed set of [recall and resentencing] provisions designed to extend the statute’s benefits retroactively.”]; *People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*) “[A] similar set of interpretive considerations [in prior cases] persuades us that the voters who passed [Proposition 36] did not intend to authorize automatic resentencing for third strike defendants serving nonfinal sentences imposed under the former version of the Three Strikes law.”].)

Our colleagues in Division Five recently applied the reasoning in *Conley* and *DeHoyos* to the question of retroactivity of Senate Bill No. 1437, concluding “the Legislature intended convicted persons to proceed via section 1170.95’s resentencing process rather than avail themselves of Senate Bill 1437’s ameliorative benefits on direct appeal.” (*Martinez, supra*, 31 Cal.App.5th at p. 728.) The court explained, “The analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal.” (*Martinez*, at p. 727.)

We agree with the reasoning of the *Martinez* court, and likewise conclude the exclusive remedy for Simpson to obtain relief under Senate Bill No. 1437 is to petition for relief under the detailed procedure set forth in section 1170.95.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the July 25, 2018 minute order and the abstract of judgment to strike the reference as to count 1 of a life sentence with a 25-year minimum parole eligibility period, and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.